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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 259

CITIES SERVICE OIL COMPANY,
Petitioner,

against

PARK STEAMSHIP COMPANY, LTD.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BARENT TEN EYCK, counsel on behalf of Cities Service Oil Company, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit dated, filed and entered April 11, 1951, (1) reversing the final decree of the United States District Court for the Southern District of New York, which ordered, adjudged and decreed that the libel herein be dismissed, with costs; and (2) remanding the cause to the United States District Court for the Southern District of New York for further proceedings in conformity with the Court of Appeals' opinion, rendered April 11, 1951.

Opinions Below

The opinion of the District Court (SAMUEL H. KAUFMAN, J.) (R. 360-374) is reported at 93 F. Supp. 201. The opin-

ion of the Court of Appeals (SWAN, *J.* with HAND, *C. J.* and FRANK, *J.*) (R. 382-387), is reported at 188 F. 2d 804.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1951 (R. 386). The issuing of that Court's mandate was delayed by the filing of a timely petition for rehearing, on April 26, 1951, which was denied by an order of the Court of Appeals dated and filed May 22, 1951 (R. 401). The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Question Presented

A two voyage charter of the tanker "Clearwater Park" contained a "safe berth" clause of a type in common use. The Court of Appeals, reversing the District Court, has found that the petitioner (charterer) breached its obligation under the safe berth clause. To reach that result the Court of Appeals interpreted the clause to require that the charterer, rather than the vessel's owner, should bear the responsibility for a local pilot's negligence in anchoring the vessel, which resulted in her grounding. The Court of Appeals has held, in essence, that the charterer has failed to designate a berth of the sort of the clause required if the negligence of the owner's pilot, in seeking an anchorage spot, could and did injure the vessel.

Such interpretation of the "safe berth" clause is novel, as far as we know; and it is in derogation of the well-established doctrine that the owner of a time or voyage chartered vessel is responsible for her navigation.

Statement

The petitioner chartered the "Clearwater Park" from the respondent, its managing owner, for two consecutive voyages with cargoes of crude oil. The voyages were to be from a safe port in Venezuela to a safe port in the United States, north of Hatteras, Norfolk/Portland range, "at charterer's option, as ordered on signing bills of lading."

The charter party contained the following safe berth clause (R. 360):

> "The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage being at the expense, risk and peril of the Charterer * * *."

On both voyages the petitioner ordered the vessel to load at Las Piedras, Venezuela (R. 360, 363). On both voyages it ordered her to discharge at "Boston Harbor Hingham Bay Anchorage into Lighters" (R. 372). That, in terms, is the petitioner's designation of a discharging berth which has been held not to have fulfilled its safe berth covenant.

The District Court found (R. 372-373), and the Court of Appeals did not question: Hingham Bay is a small bay in the southeastern part of Boston Harbor; although it contains "a great deal of shallow water" the charts current when the vessel grounded "showed an anchorage area, with over 30 feet of water, approximately 2700 yards long on its north-south axis and 700 yards wide at the widest point on its east-west axis"; on the vessel's two arrivals in Boston Harbor, in December 1945 and January 1946, she was anchored by Mr. Cleverly, a local pilot, who had been

employed by the respondent; the "spot selected for an anchorage" on the vessel's first arrival "was dangerously close to shallow waters indicated on the then current charts", and the vessel touched bottom in those shallow waters; the "spot selected for an anchorage" on the vessel's second arrival "was dangerously close to shallow waters and shoal areas indicated on the then current charts", and the vessel grounded "on an uncharted rock at or about the spot where the then current charts indicated the presence of shoal areas"; and a "pilot, exercising reasonable care, could have anchored the Clearwater Park in Hingham Bay without exposing it to the danger of shallow waters or shoal areas."

The District Court's conclusions of law were (R. 373-374): the charterer's "designation of 'Boston Harbor Hingham Bay Anchorage' was a sufficiently precise designation under the terms of the charter"; a "fair construction of the charter" made the petitioner "responsible for all damages arising from reasonably foreseeable hazards at those spots in Hingham Bay where a vessel of the size, type and draft of the Clearwater Park would be anchored in the exercise of reasonable care"; both in December, 1945, and in January, 1946, Cleverly "did not exercise reasonable care in selecting the spots where the Clearwater Park anchored, as a result of which she touched bottom in December 1945 and grounded in January 1946"; and Cleverly's "faults are attributable to" the respondent.

The Court of Appeals disagreed (R. 383) with the District Court's opinion "that the charterer's designation of 'Boston Harbor Hingham Bay Anchorage' was a sufficiently precise" one, and "that Hingham Bay was a 'safe place' inasmuch as it contained areas where the vessel could have anchored without danger of grounding"; and it disagreed with that court's opinion that the charterer was not obliged

"to designate the exact spot where the vessel was to anchor".

Defining the question it deemed basic to decision the Court of Appeals wrote (R. 383):

> "The issue presented for decision is whether the charterer or the owner was obligated to select a safe berth for discharging into lighters in an area containing both safe and unsafe berths. The answer must be sought in the language of the safe berth clause, which permits the vessel to discharge at any one of three *loci* provided she 'can proceed thereto, lie at, and depart therefrom always safely afloat.' The three *loci* are 'any safe place or wharf, or alongside vessels or lighters reachable on her arrival.' Specifically the question is whether the word 'place' means the spot selected to drop anchor (plus the area over which the tanker may swing on a tide) when she is to discharge into lighters. Both the language and the purpose of the clause require an affirmative answer."

It is our position that the Court of Appeals erred in its formulation of the question to be decided, and adopted a clearly erroneous construction of the safe berth clause.

* * *

Analyzing the language of the clause, the Court of Appeals centered its attention on the word "place", observing:

> "The 'place' must be one 'at' which the vessel can lie. This is appropriate language to refer to her specific berth while at anchor, but is wholly inappropriate if 'place' is construed to include an area as large as Hingham Bay. Moreover, the natural meaning of 'safe place' is a place entirely safe, not an area only part of which is safe."

Continuing, the opinion invoked the *ejusdem generis* rule, stating: "Only a specific anchorage spot is the equivalent

of a berth at a wharf" (R. 384). Concluding, the opinion cited (R. 384, and footnote 1) precedents which have given the word "place", in safe berth clauses, "a spatially limited construction".

The Court of Appeals (R. 384) thought the purpose of the safe berth clause "also" supported the construction it adopted. Pointing out that the "most advantageous place" for discharging a tanker would be "a wharf at the refinery" the Court observed that, if discharge is into lighters, "the closer the ship can get to the refinery the less the cost of lighterage." The Court concluded that the charterer "bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice".[1]

Specification of Errors to Be Urged

The Court below erred:

(1) In failing to affirm the final decree of the District Court dismissing the libel.

(2) In ordering, adjudging and decreeing that said decree of the District Court be reversed with costs and the cause remanded for further proceedings in accordance with its opinion.

[1] The Court of Appeals found it immaterial (R. ~~386~~ 385) whether Cleverly, the pilot, was "employed" by the owner or the charterer, because it held that "the charterer had the duty to procure a specific anchorage" and was thus responsible for Cleverly's conduct as a "borrowed servant". Also, the Court of Appeals rejected the petitioner's contentions (R. ~~386-387~~ 385-386) to the effect that it was negligent omissions by the vessel's officers, rather than the petitioner's breach of the safe berth covenant (if breach were assumed), which proximately caused the groundings. We do not urge that its rulings in either of these respects raise questions so important or substantial as to justify certiorari. 526

Reasons for Granting the Writ

The Court of Appeals' interpretation of the safe berth clause has for the first time placed on a voyage charterer (and so, necessarily, on a time charterer as well), a responsibility with respect to the vessel's navigation.

It is well settled that the owner is not only generally responsible for a chartered vessel's navigation, through its servants, but has the specific duty of taking effective measures to avert impending danger not foreseen by a pilot, including the displacing of the pilot. *The China,* 74 U. S. (7 Wall.) 53; *Robins Dry Dock & Repair Co.* v. *Navigazione Libera Triestina,* 32 F. 2d 209 (C. C. A. 2); *City of Los Angeles* v. *Standard Transp. Co.,* 32 F. 2d 988 (C. C. A. 9); *The Hathor,* 167 F. 194; *The Leader,* 166 F. 139. It is clear that the berthing of a vessel is a part of her navigation. *The West Eldara,* 104 F. 2d 670 (C. C. A. 2); *The Niels R. Finsen,* 52 F. 2d 795 (S. D. N. Y.); *Luckenbach* v. *Insular Line,* 186 F. 327 (C. C. A. 2). Yet the Court of Appeals has here held that, if the charterer has ordered discharge (not at a wharf, whose qualities and potential dangers it can fairly be expected to know, but) alongside lighters in a known common anchorage area, in navigable water available to all vessels, the charterer is obligated to insure the owner against a local pilot's error of navigation in anchoring too close to surrounding shoals rather than well into available deep water.

As regards future charters, a charterer might try to protect itself by insisting on a safe berth clause which explicitly leaves the risk of such an error of navigation with the owner; but a charterer will be unprotected as regards outstanding charters, unless it has its own ship's officer, qualified in navigation, ready to board the chartered vessel whenever she arrives at a discharging port where the work of anchoring is commonly entrusted to a local

pilot. Indeed, the rationale of the Court of Appeals' decision will require the charterer to supervise all berthing, whether it is entrusted to a local pilot or accomplished by ship's personnel.

The Court of Appeals' decision places time charterers (as well as voyage charterers) in the difficult situation of having this particular responsibility of navigation, without practical means of discharging it. Time charterers, like voyage charterers have no control over a chartered vessel's navigation, and no control over those who are navigating her.

Furthermore, the decision is in derogation of the general rule that a voluntary pilot, taken aboard a vessel to navigate her in waters of which he has special local knowledge, is the servant of the shipowner, whose faults are imputed to the shipowner. *The Volund,* 181 F. 643, 666 (C. C. A. 2); *Bramble* v. *Culmer,* 78 F. 497, 504 (C. C. A. 4); *South Carolina State Highway Dept.* v. *United States,* 78 F. Supp. 598, 601. Thus, a shipowner cannot recover from others for damage to its vessel resulting from a voluntary pilot's fault. *The Oceanic,* 74 F. 642 (C. C. A. 5; cert. den. 163 U. S. 689). And a voluntary pilot renders the ship, or her owner, liable for damage caused (e.g., by a collision) to others as a result of his not properly anchoring her. *The Amiral Cecille,* 134 F. 673; *The Robert Rickmers,* 131 F. 638 (rev'd on other grounds, 142 F. 305).

Finally, the charter party contains the following general provision: "Nothing herein stated is to be construed as a demise Charter of the Vessel." It is, of course, well settled that the charterer under a demise charter, unlike the charterer under a time or voyage charter, does assume control of the vessel's navigation. It seems inescapable that a construction of the safe berth clause which imposes even one burden of navigation on the charterer makes the

charter "a demise Charter" to that extent. Thus, the Court of Appeals' construction of the safe berth clause defies the charter party's general injunction that nothing stated in it "is to be construed as a demise Charter of the Vessel."

* * *

First, as to the language of the clause, we do not doubt that the parties to a charter party can, by their contract, vary the normal rule of admiralty law as to the responsibility for a vessel's navigation; but we respectfully submit that a rule so well established, in the light of which countless charters are made, and countless policies of marine insurance written, should not be held to have been varied unless by clear, unequivocal language of the parties evidencing their intent to place a burden of navigation upon the charterer. It is our position that the language of the safe berth clause here in question does not do that, particularly when it is read in the light of the charter party's flat provision that nothing stated in it is to be construed as a demise charter.

We find no sound reason for, and ample reason against, the Court of Appeals' emphasis upon the use of the word "place" in the safe berth clause. As that court recognized (R. 383), the language of the clause "permits the vessel to discharge at any one of three *loci*"; always, of course, "provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat * * *". Those three *loci* are:

(1) "any safe place";

(2) "any safe * * * wharf";

(3) "alongside vessels or lighters reachable on" the vessel's "arrival".

As we see it, the clause gave the petitioner the option of choosing between three separate, and mutually exclusive, kinds of discharging berth. Thus, the petitioner was entitled to order, as it clearly did order, discharge at a berth of the third type: alongside lighters. The separable parts of the clause permitting designation of a safe place, or a safe wharf, were not resorted to in this case.

Refined analysis of the function and meaning of the words "place" and "wharf", in parts of the clause *not* called into play, is not calculated to develop the meaning of the clause as applied to the facts here presented. It seems to use that such analysis is a semantic exercise without bearing on the case.

Also, it seems to us that the argument (R. 384) from the use of the word "wharf", aided by the *ejusdem generis* rule (*i. e.*, that the petitioner was required to designate a "place" as specific as any "wharf" it might designate), is misconceived. The *ejusdem generis* rule "is not by any means a rule *required* by logic": The Origin and Logical Implications of the Ejusdem Generis Rule, by Glanville L. Williams, 7 The Conveyancer, N. S., 119. The key word in the caption of the clause is "berth". It is a generic term, of which the locutions "place", "wharf", and "alongside vessels or lighters" are specific instances. Williams writes (*id.*, p. 126) that when a wide genus is selected "the ejusdem generis rule may be deprived of some of its effect"; and he adds that there are circumstances in which the rule may be wholly deprived of its effect of cutting down the operation of general words. One such instance, Williams tells us, "is where the specific instances do not disclose a genus narrower than the general words themselves".

We think the problem of extracting the meaning of the part of the clause that *was* called into play is much simpler

than either of the courts below has thought. We think the meaning is clearly ascertainable simply by breaking the clause down with reference to the three kinds of *loci* whose designation as discharging berths was permitted. If that is so the question was, and is, simply whether the "Clearwater Park" *could* proceed to, lie at and depart from a berth alongside lighters in Hingham Bay Anchorage, always safely afloat.

The District Court's findings and conclusion of law (R. 373-374) to the effect that "the pilot did not exercise reasonable care in selecting the spots where the Clearwater Park anchored, as a result of which she touched bottom in December 1945 and grounded in January 1946", were, in all but the ultimate question of cause and effect, virtually adopted by the Court of Appeals when it wrote (R. 383): "Since the facts are set out at length in the district court's opinion, 93 F. Supp. 201, it will suffice here to say that on each occasion the vessel was piloted to Hingham Bay Anchorage by Pilot Cleverly, who selected the spot where the anchor was dropped and negligently anchored too close to shoal water, and on each occasion the vessel grounded." The District Court also found (R. 373) that a "pilot, exercising reasonable care, could have anchored the Clearwater Park in Hingham Bay without exposing it to the danger of shallow waters or shoal areas"; and the Court of Appeals expressed no disagreement with that finding.

We think it follows that, on the record here presented, the vessel could have lain at a berth alongside lighters in Hingham Bay, always safely afloat; and if that is so the language of the safe berth clause, properly interpreted, did not require the petitioner, through Cleverly, to select an exact spot to drop anchor which should be unconditionally safe.

• • •

Second, as to the purpose of the clause, we find no support for the Court of Appeals' view (R. 384) that the charterer "bargains for the privilege of selecting the precise place for discharge".

It is true that the ideal place for discharging a tanker would be a wharf at the refinery; but, for reasons which were disclosed at the trial (R. 175-177), the petitioner did not have the use of its own tanker dock, near Boston. Thus, it was obliged to order discharge into lighters. It is also true, as the Court of Appeals noted (R. 384) that, if discharge is into lighters, "the closer the ship can get to the refinery the less the cost of lighterage".

But this is true only within limits. In the case of a deep water anchorage area 2,700 yards long and 700 yards wide at its widest, where because of variations in the width "the entire length was not available as an anchorage for a vessel of the size of the Clearwater Park" (R. 367), it made no real difference to the charterer whether the vessel was anchored in one particular spot or another, within the available safe area. We think it is clear, as the District Court wrote (R. 367), regarding the commercial value of "the privilege of designating the exact spot for discharge", that "in the instant case no possible economic benefit could accrue to respondent [petitioner here] from such a privilege; for its purposes, any place in Hingham Bay was of equal value".

* * *

Our petition is based squarely on the contentions: first, that the Court of Appeals has misinterpreted the safe berth clause; second, that it has established a novel and unworkable exception to the deeply rooted doctrine of admiralty law concerning the responsibility for a time or voyage chartered vessel's navigation; third, that the ex-

ception thus established importantly affects the interests of voyage and time charterers in general, as well as the interests of their marine insurance underwriters; and fourth, that such a departure from the doctrine of the owner's responsibility for a vessel's navigation should be made, if at all, only by this Court.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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